In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1369

MORISE THAL, PETITIONER

v.

RALPH W. PITMAN AND ISADORE H. BELLIS, TRUSTEES, AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) has not been officially reported. The opinion of the district court (Pet. App. 6a–16a) is reported at 288 F. Supp. 786.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1969, and the court denied petitioner's timely petition for rehearing on March 19, 1969. The petition for a writ of certiorari was filed on May 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

350-867—69

QUESTION PRESENTED

Whether, as a party in a reorganization proceeding under Chapter X of the Bankruptcy Act, the Securities and Exchange Commission may participate in the Chapter X trustees' public examination of the former president and chief operating officer of the debtor corporations, while the Commission is conducting a separate investigation of those corporations pursuant to the federal securities laws.

STATUTE AND RULE INVOLVED

Pertinent statutes and rules are set forth in the appendix (pp. 9–13, *infra*).

STATEMENT

The petition seeks review of the Third Circuit's *per curiam* affirmance of a district court order directing the petitioner to be sworn and to testify at a trustees' examination being conducted pursuant to Section 167 of Chapter X of the Bankruptcy Act, 11 U.S.C. 567.

The matter arose in connection with the proceeding for the reorganization of Commonwealth Financial Corporation ("Commonwealth") and two subsidiaries under Chapter X of the Bankruptcy Act, 11 U.S.C. 501 *et seq.*, instituted by a voluntary petition filed in the district court on December 4, 1967 (App. 1a).[1] An order was entered on that date approving the petition and appointing respondents Ralph W. Pitman and Isadore H. Bellis as trustees. Shortly thereafter, the

[1] The appendix to briefs which was filed in the court of appeals is referred to as "App. ___a." The appendix to the petition for a writ of certiorari is referred to as "Pet. App. ___a."

Commission requested leave to file a notice of appearance pursuant to Section 208 of Chapter X, 11 U.S.C. 608, and the court approved the filing (Pet. App. 1a–2a). The Commission has been a party since that time.[2]

On March 20, 1968, acting pursuant to Section 167, the district court authorized the trustees to examine the directors and officers of the debtor corporations concerning the corporations' prior affairs (Pet. App. 6a; App. 3a). The court specifically authorized the Commission to participate in this examination (Pet. App. 6a). Counsel for the trustees then scheduled a public examination of petitioner, the former president and chief operating officer of the debtor corporations (Pet. App. 8a & n. 7; App. 18a), at which petitioner appeared but refused to be sworn and to testify. His ground for refusing was that the Commission itself was conducting a private investigation into the affairs of Commonwealth and that Commission attorneys were present at the trustees' examination (App. 21a–22a; 27a). No claim of the Fifth Amendment or any other privilege was made.

Thereafter, the trustees moved for an order directing petitioner to be sworn and to testify. The motion was granted by the district judge, who at the same time denied petitioner's motion for a protective order. In affirming the district judge's ruling, the court of appeals particularly stressed the absence and the ready availability of any self-incrimination claim.

[2] As a party in the district court the Commission was an appellee on the appeal, *Ashbach* v. *Kirtley*, 289 F. 2d 159, 162 (C.A. 8), and is therefore a respondent before this Court (Rule 21–6 of this Court).

ARGUMENT

The decision of the court below is correct and is not in conflict with the decisions of this or any other Court. The petition presents no question warranting review by this Court.

1. The court below correctly held that, as a party to the reorganization proceeding, the Commission was entitled to participate in the trustees' Section 167 examination. As this Court has pointed out, in adopting Section 208 of Chapter X, Congress contemplated the "active participation of the SEC" [3] in reorganizations to which the Commission is a party. Participation by the Commission in all phases of a Chapter X proceeding is fully authorized by Section 208, under which the Commission becomes "a party in interest, with the right to be heard on all matters arising in such proceeding * * *" and is "deemed to have intervened in respect of all matters in such proceeding * * *" once its notice of appearance is approved.[4] The right of the Commission to participate in all phases of a reorganization proceeding has long been recognized,[5] and was reaffirmed only last year, *Securities and Ex-*

[3] *Securities and Exchange Commission* v. *American Trailer Rentals Co.*, 379 U.S. 594, 604.

[4] The breadth of this language from Section 208 is emphasized by the qualification in Section 207, 11 U.S.C. 607, that the judge may permit "a party in interest to intervene generally *or with respect to any specified matter*" (emphasis added). Section 208, like Section 206, 11 U.S.C. 606, contains no such qualification. See *In re Flour Mills of America*, 27 F. Supp. 559, 561 (W.D. Mo.).

[5] See 6A Collier, *Bankruptcy*, § 9.27 & n. 25 (14th ed. 1968).

change Commission v. *Krentzman*, 397 F. 2d 55 (C.A. 5).[6]

2. Petitioner appears not to question the propriety of a Chapter X examination while he may be under investigation for possible violations of the securities laws; he urges only that the Commission not be permitted to participate.[7] But the Commission's participation in the Chapter X investigation is to assist the trustee, not to uncover criminal violations of the se-

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[6] Petitioner argues (Pet. 8) that "[p]hilosophically there is a conflict" between the decision below and *Securities and Exchange Commission* v. *Templar*, 405 F. 2d 126 (C.A. 10). In *Templar* the court "agree[d] that Section 208 gives the Commission participation rights similar to those of other parties in a Chapter X proceeding," 405 F. 2d at 128, and, indeed, the court below appeared to cite the case for that proposition (Pet. App. 2a).

[7] Compare *United States* v. *Simon*, 373 F. 2d 649 (C.A. 2), certiorari granted *sub nom. Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425, where the Court of Appeals for the Second Circuit rejected an argument that accountants whose depositions were sought by a Chapter X trustee in a civil suit against their firm should not have to testify until resolution of a criminal action pending against them involving the same facts. Here, no federal indictment has been returned against the petitioner. (Some months after the decision below, the Commission referred its files in this matter to the Department of Justice with the recommendation that petitioner and others be indicted for violating various sections of the federal securities laws and the conspiracy statute, 18 U.S.C. 371; petitioner has been apprised of the referral and recommendation by letter.) Additionally, in *Simon*, as noted by the district court, 262 F. Supp. 64, 68 (S.D.N.Y.), the damage suit was being "actively prosecuted"; the trustees' examination here, as to petitioner, is basically to ascertain facts pertaining to possible causes of action available to the estate and also pertaining to the formulation of a Chapter X plan.

curities laws.[8] The purpose of such investigation is to make a full and complete inquiry into "the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof" (Section 167(1)) to determine whether reorganization is feasible, and, if so, to work out a fair plan. The trustee is also authorized to inquire into "fraud, misconduct, mismanagement and irregularities, and * * * any causes of action available to the estate" (Section 167(3)). As a party to the proceeding, the Commission is entitled to assist the trustees in their inquiry. Possible violations of the securities laws by the debtor corporations' former officials become relevant to the Chapter X investigation only because such violations might affect the validity or rank of their claims against the corporations and might give rise to causes of action against them.[9]

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[8] It is true that where it appears that violations of the securities laws may have occurred, Commission counsel generally warn witnesses at Section 167 examinations of the right to invoke the privilege against self-incrimination and to be represented by counsel. Petitioner quotes, out of context, a portion of such a warning and asserts that Commission counsel were prepared to examine him on matters involving violations of the federal securities laws (Pet. 6). But a reading of the warning in context (App. 23a) makes clear that the Section 167 examination was not to be used for any purpose other than that set forth in Chapter X.

[9] *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195 (C.A. 5), certiorari denied, 365 U.S. 814. For recent suits instituted by Chapter X trustees against former management officials and others based on violations of the federal securities laws, see, *e.g.*, *In the Matter of Continental Vending Machine Corp.*, E.D.N.Y., No. 63–B–663, and *In the Matter of Westec Corporation*, S.D. Texas, No. 66–H–62.

3. The Commission has independent power to investigate violations of the securities laws to decide whether to invoke the criminal process, and does not need the assistance of Section 167 examinations for that purpose.[10] Nor does a distinction between public and private proceedings have the significance petitioner seeks to attach to it. While most Commission investigations are private, the Commission has authorized its staff to turn over material gathered in its investigations to government officials, court-appointed officers (including Chapter X trustees), and even to private parties, where it believes public investors would benefit.[11] Section 21 of the Securities Exchange Act of 1934, 15 U.S.C. 78u, authorizes the Commission to publish any material gathered in an investigation; the Commission's rules specify that the prohibition against disclosure of information by Commission employees does not continue where "* * * the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest." 17 CFR §§ 230.122 and 240.0–4 (see pp. 10, 13, *infra*).

4. Requiring petitioner to be sworn and to testify in the pending Section 167 examination can abridge

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[10] See, Section 20 of the Securities Act of 1933, 15 U.S.C. 77t; Section 21 of the Securities Exchange Act of 1934, 15 U.S.C. 78u; Section 18 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79r; Section 321 of the Trust Indenture Act of 1939, 15 U.S.C. 77uuu; Section 42 of the Investment Company Act of 1940, 15 U.S.C. 80a–41; Section 209 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–9.

[11] The debtor corporations have approximately 1500 public investors.

no constitutional privilege. On proper objection, he can refuse to answer any question that would tend to incriminate him. But the Fifth Amendment does not allow him categorically to refuse to participate in the examination. As Mr. Justice Holmes pointed out in *United States* v. *Sullivan*, 274 U.S. 259, 263–264, where the Court reversed the reversal of a conviction for refusal to file an income tax return:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. * * * He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. * * *

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

APPENDIX

Bankruptcy Act (Chapter X):

SECTION 167

The trustee upon his appointment and qualification—

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

* * * * *

SECTION 208

The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be

deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding.

Rule under the Securities Act:

RULE 122. NONDISCLOSURE OF INFORMATION OBTAINED IN THE COURSE OF EXAMINATIONS AND INVESTIGATIONS

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 8 (*e*) or 20 (*c*) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other nonpublic records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making available such information or documents.

Securities Exchange Act:

INVESTIGATIONS; INJUNCTIONS AND PROSECUTION OF OFFENSES

SECTION 21

(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the

United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which

he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

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Rule under the Securities Exchange Act:

RULE 0–4. NONDISCLOSURE OF INFORMATION OBTAINED IN THE COURSE OF EXAMINATIONS AND INVESTIGATIONS

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 17(a) or 21(a) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other nonpublic records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such a subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or document sought, and any circumstances which may bear upon the desirability of making available such information or documents.

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